No. 12340

In the United States Court of Appeals

For the Ninth Circuit

BOOTH-KELLY LUMBER COMPANY, a Corporation,
Appellant,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,
Appellee,

and

SOUTHERN PACIFIC COMPANY, a Corporation,
Cross-Appellant,

vs.

BOOTH-KELLY LUMBER COMPANY, a Corporation,
Cross-Appellee.

Appeal and Cross-Appeal from the United States District Court for the District of Oregon.

HONORABLE JAMES ALGER FEE, *Judge*

COMBINED BRIEF OF CROSS-APPELLANT AND APPELLEE SOUTHERN PACIFIC COMPANY

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BRIEF OF CROSS-APPELLANT

JURISDICTIONAL STATEMENT

This is an action between citizens of different states (Pre-trial Order, T. 33), in which the Cross-appellant seeks the recovery of $46,568.99 from Cross-appellee.

(Pre-trial Order, T. 37.) Judgment in the sum of $22,000.00 has been entered, based upon findings of fact and conclusions of law made and entered by the trial court. (Judgment Order, T. 56.) It is contended that the United States District Court for the District of Oregon had jurisdiction of this action on the basis of the above facts, under 28 U.S.C.A., Section 1332 (a) (1); and that the United States Court of Appeals for the Ninth Circuit has jurisdiction of this appeal, under 28 U.S.C.A., Section 1291.

STATEMENT OF THE CASE

(Cross-appellant is referred to herein as "Southern Pacific" or "Railroad" and cross-appellee is referred to as "Booth-Kelly" or "Industry.")

A. Facts Giving Rise to This Action.

This is an action arising out of an accident to an employee of Southern Pacific which occurred February 8, 1945, on an industrial spur track constructed to serve the plant of Booth-Kelly, across land "used or owned" by Booth-Kelly. (Admitted Facts, T. 34.) While engaged as a brakeman on one of Railroad's trains which was switching over the industrial tracks, the employee Mack D. Powers was injured by being caught between the side of the caboose from which he was detraining and a wood cart which was the property of Booth-Kelly and had been placed and left by Booth-Kelly, its employees or agents alongside said track in such a position that one corner of the cart was 42 inches from the outside

edge of the outside rail of the track. (Admitted Facts, T. 34.)

At the time of the accident there was in effect an industrial track agreement dated June 30, 1941, entered into between Southern Pacific and Booth-Kelly, covering the maintenance and operation of the industrial track facilities serving Booth-Kelly's plant. (Admitted Facts, T. 34.)

Powers brought action against Southern Pacific in the California State court under the Federal Employers' Liability Act. The complaint alleged breach of Southern Pacific's statutory duty of using ordinary care to provide Powers with a reasonably safe place in which to work in that first, Southern Pacific caused and permitted the wood cart to remain on the track and second, it failed to warn him of the presence of the wood cart and the resultant insufficient clearance. At trial the Judge removed the first specification from the jury, instructing as a matter of law that Southern Pacific had no right to remove the cart and in this sense could not be charged with responsibility for permitting the wood cart to be or remain in the position in which it was placed. (Plaintiff's Exhibit 2e, p. 352.) A verdict was returned for Mack Powers.

Shortly after filing the action and before time for answer, Southern Pacific gave notice and made demand and tender of defense upon Booth-Kelly. Defendant denied any liability arising out of the accident and refused to assume defense of the action. Subsequent to the rendering of the judgment against it, and after agree-

ment that settlement should be without prejudice to the contentions of either party, the judgment was compromised by the payment of the sum of $44,699.46. In addition, Southern Pacific was obligated to pay $1,869.53 for costs and attorneys' fees in defending the Mack D. Powers' action. (T. 35-6.)

After demand for payment of these sums was refused, Southern Pacific Company filed action against Booth-Kelly in the United States District Court for Oregon.

B. Issues Submitted and Decisions of Trial Court.

The contentions of the parties are set forth in detail in the Pre-trial Order (T. 36-44), which order superseded the pleadings. Similarly the Pre-trial Order set forth the questions of fact and issues of law which were considered determinative of the case. (T. 44-47.)

Southern Pacific contended generally: first, it was entitled as a matter of law to recover under the terms of the spur track agreement the full amount paid in satisfaction of the judgment together with attorneys' fees and costs incurred in defending the Powers action; and, second, that independent of the agreement it was entitled to recover such amount since Booth-Kelly's negligence was the active or primary cause of the injury to Powers.

With regard to recovery under the spur track agreement several questions were presented to the court: first, was Southern Pacific entitled to receive the full amount as damages for breach of the impaired clearance provisions of the contract; second, was Southern Pacific en-

titled to recover under the indemnity provisions of the contract and if so was it entitled to recover the full amount of loss, or was its recovery limited to one-half by reason of the specific language of the indemnity clause relating to concurring negligence.

After entering its Findings of Fact the trial court concluded that Southern Pacific was entitled to recover judgment against defendant for the sum of $22,000 (T. 55, Conclusions of Law No. 7), which was one-half the amount the court determined to be the damage suffered by Powers (T. 53, Finding of Fact No. 11) and Southern Pacific was not entitled to recover independent of the industrial spur track agreement (T. 55, Conclusion of Law No. 5).

From so much of the judgment of the trial court as disallowed $24,568.99 of Southern Pacific's claim, it filed this cross-appeal.

SPECIFICATION OF ERROR No. 1

BREACH OF CONTRACT

The court erred in failing to award damages to cross-appellant in the sum of $46,568.99 for breach of the impaired clearance provisions of the industrial spur track agreement. (Cross-Appellants Appeal Point No. 2, T. 130.)

Specifically the court erred as a matter of law in making and entering the following Conclusion of Law in conflict to its previous Findings of Fact:

"Plaintiff is entiled to recover judgment against defendant for the sum of $22,000 on the contract, together with its costs and disbursements incurred herein." (Conclusions of Law No. 7, T. 55.)

Summary of Argument

Since the trial court found that the placing of the wood cart within 42 inches of the track was a breach of the spur track agreement relating to impaired clearances, and found the damage to Powers and liability of Southern Pacific was the natural and necessary result of Booth-Kelly's breach of contract, and further found Southern Pacific suffered loss in the total amount of $46,568.99, the trial court should have concluded as a matter of law that Southern Pacific was entitled to damages in said amount for breach of the impaired clearance provisions of the industrial spur track agreement.

The trial court made the following Findings of Fact:

"21. The placing and leaving of the wood cart within 42 inches from the track was a breach of the provisions of said agreement relating to impaired clearances." (T. 54.)

"13. The damage to Powers and the liability of plaintiff was the natural or necessary result of defendant's breach of contract." (T. 53-4.)

"12. Plaintiff suffered loss in the amount of $44,699.46 judgment costs and of $1,869.53 court costs and attorneys' fees, by reason of an act or omission of defendant, its agents or employees to an employee of plaintiff while on the industrial track." (T. 53.)

These findings are supported by substantial evidence.

Section 5 of the industrial track agreement provides in part (T. 8-10):

"Industry agrees that without the written consent of Railroad first had and obtained, no * * * material * * * or obstruction of any character shall be, * * * piled, made, stored or maintained upon or over the premises of Railroad * * *. In the event such written consent is given, Industry agrees to comply with the following minimum clearances:

Item	Clearances
Structures, materials, poles or other obstructions of any character, except as shown below;	A minimum side clearance of 6 feet measured horizontally from the outside of nearest track rail

Industry also agrees to comply with all of the provisions of this section with respect to clearances on the property beyond the premises of Railroad * * *." (T. 8-9.)

It is an admitted fact that the wood cart was the property of Booth-Kelly and had been placed and left within 42 inches from the track by Booth-Kelly, its agents or employees. (T. 34.) The testimony of witness Nysten developed that the car was being used to store kindling for use in defendant's crane. (T. 91-2.) It is an admitted fact that the injury to Mack Powers was caused by his body coming in contact with the cart. (T. 34.)

Southern Pacific as a common carrier was not compelled under the Interstate Commerce Act to render service to Booth-Kelly over the industrial spur.

49 U.S.C.A. Section 1 (9).

By contracting to do so for Booth-Kelly's benefit, it broadened its field of potential liability and subjected itself to possible future burdens of the Federal Employers'

Liability Act. Since Southern Pacific undertook to perform services which it could not by law be compelled to render, it was entitled, in voluntarily undertaking to perform such services, to impose such conditions and limitations as it might desire with respect to liability.

9 Am. Jur., Carriers, Section 737;

Luton Mining Co. v. Louisville & N. R. Co., 276 Ky. 321, 123 SW (2d) 1055.

Booth-Kelley contracted that it would not impair the clearances. By placing the wood cart within 42 inches of the track it impaired the clearances in violation of its agreement. But for the proximity of the cart to the track Powers would not have been injured. Booth-Kelly created the unsafe place to work, thereby causing Southern Pacific to breach its statutory duty to provide Powers with a safe place to work.

The trial court having found breach of contract and resulting damages, Southern Pacific was entitled to payment in full of the amount of those damages.

25 C.J.S., Damages, Section 24:

> "As a general rule * * * the damages to which one party to a contract is entitled because of a breach thereof by the other are such as arise naturally from the breach itself or such as may reasonably be supposed to have been within the contemplation of the parties at the time of making the contract as a probable result of the breach thereof."

See also *Smith v. Palley,* et al., 130 Or. 282, 289, 279 Pac. 279.

SPECIFICATION OF ERROR No. 2

ENFORCEMENT OF INDEMNITY PROVISIONS

The court erred in failing to enter judgment against appellant, for breach of the indemnity provisions of the spur track agreement, in the sum of $46,568.99, the amount of loss suffered by cross-appellant by reason of an act or omission of appellant, its agent or employees to an employee of cross-appellant while on the industrial spur; or, in the alternative,

The court erred in failing to enter judgment against appellant for breach of the indemnity provisions of the spur track agreement, in the sum of $23,284.49, one-half the amount of loss suffered by cross-appellant by reason of an act or omission of appellant while on the industrial spur. (Cross-appellant's appeal point No. 1, T. 130-1.)

Specifically the court erred as a matter of law in making and entering the following Conclusion of Law in conflict with its previous Findings of Fact:

> "Plaintiff is entitled to recover judgment against defendant for the sum of $22,000 on the contract, together with its costs and disbursements incurred herein." (Conclusion of Law No. 7, T. 55.)

The court further erred in making the following Findings of Fact:

> "Some elements of negligence on the part of plaintiff concurred to cause the accident." (Finding No. 14, T. 54.)
>
> "Powers suffered injuries in the amount of $44,000.00." (Finding of Fact No. 11, T. 53.)

Summary of Argument

POINT ONE: Since the trial court found that Booth-Kelly was negligent in placing and leaving the cart within 42 inches

of the track and that such negligence was the active, direct, proximate and primary cause of the injury to Powers and since it further found that Southern Pacific suffered loss in the total amount of $46,568.99 by reason of an act or omission of Booth-Kelly to an employee of Southern Pacific while on the track, the court erred in failing to conclude as a matter of law that Southern Pacific was entitled to be indemnified in the amount of $44,699.46 judgment costs and $1,869.53 court costs and attorneys' fees.

POINT TWO: It was error for the trial court to reduce the amount of Southern Pacific's recovery because of "some elements of negligence (which) concurred to cause the accident," since those elements of negligence were not specifically charged in the Pre-trial Order.

POINT THREE: The language under the second clause of the indemnity provision relating to concurring negligence does not apply where the negligence of Southern Pacific is consequent upon the primary negligence of Booth-Kelly.

POINT FOUR: It was error for the trial court to determine Powers' injuries to be $44,000.00 instead of $44,699.46, since the payment of the latter amount by Southern Pacific represented the compromise of a jury verdict in a greater sum.

Point One

The trial court made the following Findings of Fact:

> "9. Defendant was negligent in placing and leaving the wood cart within 42 inches from the spur track. (T. 53.)
>
> "10. Defendant's negligence in this regard was the active, direct, proximate and primary cause of the injury to plaintiff's employee Powers. (T. 53.)
>
> "15. Plaintiff was not negligent in the form of the specifications of negligence made by defendant in the Pre-trial Order. (T. 54.)

"12. Plaintiff suffered loss in the amount of $44,-699.46 judgment costs and of $1,869.53 court costs and attorneys' fees, by reason of an act or omission of defendant, its agents or employees to an employee of plaintiff while on the industrial track. (T 53.)

"17. Employees of plaintiff observed the position of the cart and operations continued thereafter prior to the accident. (T. 54.)

"18. The loss and damage to Powers were not proximately caused by the conditions mentioned in the previous Findings (Finding)." (T. 54.)

Two sections of the agreement deal with indemnity:

Section 7 which reads in part:

"Industry also agrees to indemnify and hold harmless Railroad for loss, damage, injury or death from any act or omission of Industry, its employees or agents, to the person or property of the parties hereto and their employees, and to the person or property of any other person or corporation, while on or about said track; and if any claim or liability, other than from fire, shall arise from the joint or concurring negligence of both parties hereto, it shall be borne by them equally."

and Section 18 which reads:

"In addition to but not in qualification of the provisions of Section 7 and 17 hereof, Industry hereby releases and discharges and agrees to indemnify and save harmless Railroad, its agents, successors and assigns, from all liability resulting from the movement of cars and/or operations by Industry upon said track."

It is established by the Pre-trial Order and by the court's charge to the jury in the Mack Powers case that

Powers was injured by a wood cart which Booth-Kelly placed and permitted to remain in a position of such close proximity to the track that it struck Powers as he was attempting to leave the caboose. (T. 34, Ex. 2e, p. 355.) It is likewise established by the Powers case that the cart was on the premises of Booth-Kelly (T. 34) and that Southern Pacific had no right to remove the cart and in this sense could not be charged with responsibility for permitting the wood cart to be or remain in the position in which it was placed. (Ex. 2e, p. 351-2.)

Southern Pacific is entitled to full recovery under the indemnity provisions of the contract since the negligence of Booth-Kelly was, as between the parties, the primary and efficient cause of the accident.

Findings of Fact 9 and 10, supra;

Astoria v. Astoria & Columbia River R. Co., 67 Or. 538, 136 Pac. 645;

U.S.F. & G. Co. v. Thomlinson Co., 172 Or. 307, 141 P. (2d) 817;

Southern Pacific Company v. Layman, 173 Or. 273, 145 P. (2d) 295.

Southern Pacific's only fault, and the only determination made in the case Powers v. Southern Pacific Company, was the breach of Southern Pacific's statutory duty of using ordinary care to provide Powers with a reasonably safe place in which to work, in that Southern Pacific failed to warn Powers of the presence of the wood cart and the resultant insufficient clearance. (T. 34-5.) Southern Pacific's only fault toward its employee was

the constructive failure of the duty imposed by statute. It was an error of omission, while Booth-Kelly's affirmative act in placing the cart and leaving it in position caused the accident.

In argument during trial, counsel for Booth-Kelly stressed the fact that Southern Pacific had been found negligent with regard to its employee Powers. He argued from this fact that Southern Pacific is barred from asserting the indemnity provision of the contract. Carried to its logical conclusion this theory would preclude any indemnitee from recovering under an indemnity agreement.

Oregon decisions, in keeping with those in other jurisdictions, reveal that indemnity contracts are usually, in the absence of special language, interpreted to be intended to provide against loss or liability of one party through the act of the other, or caused by physical conditions that are under the control of the other, and over which the party indemnified has no control. As previously stated, the spur track here ran over land "owned or used" by Booth-Kelly and it was determined that Southern Pacific had no right to remove the cart. It was, thus, under the control of Booth-Kelly.

In considering and applying the findings of the trial court, it is important to recognize that the question presented to the trial court was the responsibility *as between Booth-Kelly and Southern Pacific under the industrial track agreement.* We specifically call this court's attention to the Oregon case *Astoria v. Astoria & Columbia River R. Co.,* 67 Or. 538, 136 Pac. 645, which is similar

on the facts and is direct authority for Southern Pacific's claim for full recovery under the spur track agreement.

The *Astoria* case involved an action brought by the City to recover over from defendant railroad company the amount of a judgment recovered by Annie Anderson for personal injuries. She had fallen from an elevated railroad leading from the railroad crossing, at which point no barrier had been placed. The railroad had been granted a 50-foot right of way under a City ordinance which provided that the railroad was under a duty to lay its track even with the grade of the elevated street and keep the street crossing in good condition and repair. Although defense was tendered to the railroad, it denied liability. After judgment against the City, action was brought against the railroad for the amount of the judgment plus attorneys' fees and costs of defending the Anderson action. Judgment for the plaintiff City was affirmed.

Four controversial points were decided on the appeal:

1. The City and the railroad did not stand *in pari delicto* with respect to the injury suffered by Miss Anderson, and the fact that the parties stood in *in delicto* each to the other did not foreclose contribution. The court said:

> "From a resume of the salient features of the declaration, it plainly appears that the active negligence charged is against the railroad company, while passive negligence only is laid at the feet of the municipality. All that is urged against the city is its failure properly to care for the safety of the traveling public, by not providing barriers along the

street where the accident occurred. While the city failed to perform its full duty in not requiring the company to construct and maintain aprons sufficient to protect the public from harm, and in not seeing that proper barriers were placed along the track where injury was possible, and, for that account, was liable to Annie Anderson, yet that situation does not render the parties equally delinquent. The efficient and primary cause of the accident was the negligence of the company, while the subsequent negligence of the city in not enforcing obedience to the terms of the ordinance was constructive rather than actual."

2. The judgment in the case brought by Annie Anderson was conclusive of the facts which were there the subject of controversy, since the railroad was notified of the pendency of the action. The scope of estoppel in that case embraced all issues determined by it.

3. Costs and attorneys' fees constituted appropriate items of damage for which the City might claim indemnity.

4. The railroad was given such notice of the pendency of the Anderson action as rendered the judgment recovered therein conclusive against the railroad.

Commenting on this case, the Oregon court said in a later decision:

> "The defective condition was caused by the railroad company in laying its tracks at a grade above street level in violation of the terms of its franchise. The City was held liable by reason of its failure to enforce an ordinance requiring the company to repair the defect. In this case the parties were not *in pari delicto*. The railroad company was primarily negligent while the negligence of the city was secondary.

> The railroad company was bound to indemnify the city by virtue of its contractual relationship. It was not a question of contribution between joint tort-feasors whose active and concurrent negligence caused the injury."
>
> *Fidelity and Casualty Co. of N.Y. v. Chapman,* 167 Or. 661, 120 P. (2d) 223.

In *Southern Pacific Company v. Layman,* 173 Or. 273, 145 P. (2d) 295, which stands for the proposition that an indemnity provision will not be interpreted to indemnify the indemnitee against loss suffered *solely* by reason of his own negligence, in the absence of such intention expressed in unequivocal terms, the Oregon court indicated that under a factual situation similar to that presented in the instant case, the indemnity provision would be invoked in favor of Southern Pacific. The court said:

> "By the terms of the contract now in question it was the duty of the defendant to maintain and keep the crossing in good repair, and it is readily conceivable that his negligent failure to discharge that obligation might be the primary cause of an accident to one of the defendant's trains, which would result in injury to passengers and a consequent liability to the defendant. In such a case the plaintiff would evoke the indemnity clause of the contract. An interpretation which limits the general language of the agreement to instances of that character suffices to give effect to the agreement and, in our opinion, is reasonable."

Point Two

Although the trial court found that Southern Pacific was not negligent in the form of the specifications of

negligence made by defendant in the Pre-trial Order (Finding of Fact No. 15, T. 54), the court in its 14th Finding stated, "Some elements of negligence on the part of plaintiff concurred to cause the accident." (T. 54.)

Evidently based on this latter finding, and the language in Section 7 of the spur track agreement relating to concurring negligence, the trial court entered judgment for $22,000 instead of for the full amount required to compromise the judgment and pay court costs and attorneys' fees.

There was no basis for the trial court's Finding of Fact No. 14, either in proof, pleadings or issues framed by the Pre-trial Order.

Federal Rules of Civil Procedure, Rules 8, 15.

The Pre-trial Order provides that it superseded the pleadings. (T. 49.) It was error for the trial court to make a finding of concurrent negligence, on grounds not made an issue in the pleadings, and which Southern Pacific had had no opportunity to meet with testimony or by argument.

Fehely v. Senders, 170 Or. 457, 135 P. (2d) 283.

Point Three

Assuming without admitting that Southern Pacific was guilty of some negligence which concurred to cause the accident, the language under the second clause of the indemnity provision in Section 7, relating to concurring negligence does not apply where the negligence of

Southern Pacific is consequent upon the primary negligence of Booth-Kelly.

> *Astoria v. Astoria & Columbia River R. Co.*, 67 Or. 538, 136 Pac. 643;
>
> *Deep Vein Coal Co. v. Chicago & E. I. R. Co.*, 71 Fed. (2d) 963.

The decision in the *Astoria* case supporting this statement has already been cited and quoted at length. In the *Deep Vein* case, defendant's mines were served by a switch track which the railroad had constructed under a written contract whereby the coal company agreed to indemnify and save the railroad harmless for:

> "loss, damage or injury from any act or omission of the coal company, its employees or agents, to the person or property of the parties hereto and their employees and to the person or property of any other person or corporation while on or about said tracks, and if any claim or liability, other than from fire, shall arise from the joint or concurring negligence of the parties hereto, it shall be borne by them equally."

The contract also contained a provision that the coal company would not erect or allow to be erected any building, structure, fixture or any pile of any kind in dangerous proximity to the track, and the coal company would indemnify and save harmless the railroad against loss, damage or expense in consequence of injury to or death of any person by reason of or growing out of the location of any such building, structure, fixture or pile.

An accident happened by reason of the maintenance by coal company of a line of poles. By agreement, the

railroad settled with the injured man. Contending that the first quoted paragraph applied, the coal company paid one-half the amount of settlement, but refused to pay the other half. In granting full recovery to the railroad the court said:

> "It seems to us that the joint or concurring negligence covered by paragraph 8 is not the negligence of one party consequent upon the primary negligence of the other. But be that as it may, paragraph 10 definitely and specifically covers such a case as this."

In the case at bar the negligence, if any, of Southern Pacific was consequent upon the primary negligence of Booth-Kelly in placing and leaving the cart within 42 inches of the track, in violation of the specific provisions of the spur track agreement.

Instances where an injury was the result of the concurring negligence of the two parties may be conceived, as where the railroad and an employee of Industry pushing a cart or driving a vehicle were concurrently approaching a given point on the track. But those are not the facts in the instant case.

Under the law as enunciated in the *Astoria* and *Deep Vein* cases Southern Pacific is entitled to recover the full amount of its loss, and entry of judgment in any lesser amount is error.

Point Four

The payment by Southern Pacific of the sum of $44,699.46 was in compromise of a jury verdict and judg-

ment in the sum of $46,110.00. (Plaintiff's Exhibits 2f and 2g.) The trial court erred in independently determining Powers' damage to be $44,000.00, since this question was litigated and decided in the action Powers v. Southern Pacific Company and thus was binding on the parties to the instant action. (Admitted Facts, T. 36.) The judgment of the trial court should therefore have included the sum of $44,699.46 as well as attorneys' fees and costs.

SPECIFICATION OF ERROR No. 3

RECOVERY INDEPENDENT OF CONTRACT

The court erred in failing to award recovery to cross-appellant in the sum of $46,568.99 independent of contract, because appellant's negligence in placing and leaving the wood cart within 42 inches from the spur track was the active, direct, proximate and primary cause of the injury to cross-appellant's employee Powers, and of cross-appellant's resulting liability. (Cross-appellant's appeal point No. 3, T. 131.)

Specifically the court erred as a matter of law in concluding, in conflict with its Findings of Fact, as follows:

> "Defendant is not obligated to pay plaintiff $44,568.99 ($46,568.99) or any part thereof, independent of the industrial spur track agreement."
>
> (Conclusion of Law No. 5, T. 55.)

Summary of Argument

Since the trial court found Booth-Kelly was negligent in placing and leaving the wood cart within 42 inches from the spur track and its negligence in this regard was the active, direct, proximate and primary cause of the injury to Powers

and since it further found Southern Pacific was not negligent in the form of the specifications of negligence made by Booth-Kelly in the Pre-trial Order, the trial court should have concluded as a matter of law that Southern Pacific was entitled to recover from Booth-Kelly the full amount of loss suffered by it.

Shearman & Redfield Negl., Rev. Ed., §894.
Scott v. Curtis, 195 N.Y. 424;
Lowell v. Boston & Lowell R. Corp., 23 Pick 24;
Astoria v. Astoria & Columbia River R. Co., supra.

Independent of indemnity provisions in agreements covering the performance of work, and in some instances wholly apart from any contractual relationship, the rule of law is laid down that recovery will be allowed against the active wrongdoers.

> "One liable only by reason of a duty imposed by law for consequences flowing from the negligent conduct of another, and not an actual participant in that conduct, may recover over against the active perpetrator of the wrong. The latter stands in the relation of an indemnitor to the former."
>
> *Shearm. & Redf. Negl.,* Rev. Ed., Sec. 894.

In *Scott v. Curtis,* 195 N.Y. 424, action was brought by Scott for the amount of damages paid by him to a third person who fell into the coal chute serving Scott's property, allegedly because of the negligent manner in which defendant's employees had covered the chute. A verdict for Scott was reversed without prejudice since no evidence had been introduced showing how the accident had occurred. The court stated: "It may be assumed this action will lie" if the accident occurred by reason of

the negligent manner in which defendant's employees temporarily covered or guarded the hole.

By way of guidance at the new trial, the court had this to say concerning the relationship of the parties between themselves:

> "The liability of the owner of real property for injury to a passer-by for negligence in covering or in failing to cover or guard such a hole in a sidewalk does not relieve the active or actual wrongdoers from the consequences of their acts. The liability to the passer-by is joint. As between themselves the active wrongdoer stands in the relation of an indemnitor to the person who has been held legally liable therefor."

In the case *Lowell v. Boston & Lowell Railroad Corp.*, 23 Pick. 24, where, unlike the *Astoria* case, there was no contract or franchise, the railroad made a cut in the street in the course of building a new line. Barriers at the cut were left down and a third person was injured. The town, on being held liable, brought this action against the railroad. A judgment for the town was affirmed. The court discussed the general rule concerning joint tort-feasors, then said:

> "Our law, however, does not in every case disallow an action by one wrongdoer against another, to recover damages incurred in consequence of their joint offense. The rule is *in pari delicto potior est conditio defendentis.* If the parties are not equally criminal, the principal delinquent may be held responsible to his co-delinquent for damages incurred by their joint offense. * * * But when the offense is merely *malum prohibitum,* and is in no respect

> immoral, it is not against the policy of the law to inquire into the relative delinquency of the parties, and to administer justice between them, although both parties are wrongdoers."

This rule is also set out in the *Astoria* case, previously discussed in this brief under Specification of Error No. 2.

The rules of law set forth in these authorities are applicable here because plaintiff did not participate in the original wrong—in the placing of the cart. Hence recovery in the full amount should be awarded Southern Pacific, independent of contract.

BRIEF OF APPELLEE SOUTHERN PACIFIC COMPANY

ANSWER TO BOOTH-KELLY'S STATEMENT OF THE CASE

(Appellant is referred to herein as "Booth-Kelly" or "Industry" and Appellee is referred to as "Southern Pacific" or "Railroad")

Counsel for Booth-Kelly has combined argument with fact in his Statement of the Case, sometimes without express designation. Besides this failure of designation, counsel has also failed to carry the argument over into the portions of his brief devoted to Specifications of Error. By this organization of his brief, counsel has created a problem in the orderly refuting of Booth-Kelly's points, and we therefore make these comments, lest the court accept counsel's Statement of the Case at face value.

An example is the assumption that the service performed by Southern Pacific at the time of the accident did not either directly or indirectly benefit Booth-Kelly. We view this contention as immaterial to the case, since consideration for the contract as a whole was amply established, but wish to point out there was no determination on this point either in the Powers case or by the trial court. Even should the point be considered worthy of the court's attention, the facts are as consistent with a finding of benefit to Booth-Kelly as with a finding of sole benefit to the Railroad.

Again on page 5 of the Statement counsel argues that the spur track agreement, upon which this action is partially based, was Southern Pacific's unilateral redraft of of old agreements. Again there was no finding to this effect by the trial court. Not only is this contention immaterial, but it is incorrect. The previous agreements were admitted in evidence subject to Southern Pacific's objections, but if the subject is thought germane by this court, then a comparison of the older agreements with the 1941 spur track agreement would show that Booth-Kelly was given certain privileges in connection with the maintenance of unloading facilities, and the use of the crane set-out spur, which had not previously existed.

Again counsel misinterprets the Oregon statute, without even stating his interpretation is subject to question, in connection with the extent of a common carrier's duty to furnish service over a private side track. This point is argued under Booth-Kelly's Specification of Error III and will be answered later in this brief.

ANSWER TO BOOTH-KELLY'S SPECIFICATION OF ERROR NO. I

Summary of Argument

The trial court correctly concluded that the determinations in the Mack Powers action against Southern Pacific are not res adjudicata in this action, because the question of ultimate responsibility as between Booth-Kelly and Southern Pacific for the damage and loss suffered by Powers was not litigated in that action.

The fundamental question involved in the instant case is the responsibility as between Booth-Kelly and Southern Pacific for the damage to Powers and the loss thereby occasioned to Southern Pacific. In resolving that question, the primary responsibility of Booth-Kelly for the accident and its obligations under the contract are important.

The trial court not only found that Booth-Kelly breached the impaired clearance provisions of the spur track agreement, but also was negligent in placing and leaving the cart in position and that such negligence was the primary cause of the injury to Powers. Counsel has advanced no evidence which would justify setting aside these findings (see Federal Rules of Civil Procedure Rule 52(a)) but argues the decision in the Powers case prevents any such findings being made.

The Powers case was concerned only with a determination of Southern Pacific's responsibility to its employee under the Federal Employers Liability Act, and with the amount of damage suffered by Powers. No question of relative responsibility as between Southern Pacific and Booth-Kelly was there determined. No spur track agreement was discussed or applied, and indeed would have been immaterial in the trial of Powers' claim against the Southern Pacific.

We agree that just as Booth-Kelly must abide by the determinations actually made in the Powers case, so must Southern Pacific in seeking recovery from Booth-Kelly accept the findings in the Powers case upon questions there litigated and determined. The findings in

the Powers case, however, are not inconsistent with the findings entered by the Court in the instant case.

Since the trial court determined that Booth-Kelly's negligence was the primary cause of the accident, and in the light of the spur track agreement, Southern Pacific is entitled to recover in full from Booth-Kelly.

Astoria v. Astoria & Columbia R. R. Co., 67 Ore. 538, 136 Pac. 645;

Hudson Valley Railway Co. v. Mechanicville E. L. & G. Co., 180 App. Div. 86, 167 N.Y.S. 428.

In the *Hudson Valley* case, cited by counsel in his argument under Point One, defendant Electric Company allowed its power line to sag on top of electric railway's wire, causing the wire to burn in two, drop to the street and kill a horse. The owner sued and recovered judgment against both Electric Company and the Railway, and collected from the latter. Railway sued the Electric Company, alleging the latter was primarily liable, and obtained a jury verdict and judgment. Based upon the previous decision holding the parties jointly liable, the trial court set the judgment aside. Held error.

The Appellate Court stated the previous judgment merely showed both parties were liable to the owner. The general rule against contribution did not apply where the Electric Company did the act or created the condition and the Railway Company did not actively join in —although the latter might have taken precautions to protect the public.

The *Astoria* case, on its facts, is analogous to the instant case. There, the City brought action to recover over from Railroad Company the amount of a judgment recovered by Annie Anderson for personal injuries. She had fallen from an elevated roadway leading to the railroad crossing, at which point no barrier had been placed. Railroad had been granted a 50 foot right-of-way under a City ordinance which provided the Railroad was under a duty to lay its track even with the grade of the elevated street and keep the street crossing in good condition and repair. Defense was tendered to the railroad and refused.

In granting recovery to the City against the Railroad, the Court determined after full discussion that the parties were not *in pari delicto*. After examining the complaint filed by Miss Anderson in the action against the City, the Court stated:

> "From a resume of the salient features of the declaration, it plainly appears that the active negligence charged is against the Railroad Company, while passive negligence only is laid at the feet of the municipality. All that is urged against the City is its failure properly to care for the safety of the traveling public, by not providing barriers along the street where the accident occurred. While the City failed to perform its full duty in not requiring the Company to construct and maintain aprons sufficient to protect the public from harm, and in not seeing that proper barriers were placed along the track where injury was possible, and, for that account, was liable to Annie Anderson, yet that situation does not render the parties equally delinquent. The efficient and primary cause of the accident was the negligence of the Company, while the subse-

> quent negligence of the City in not enforcing obedience to the terms of the ordinance was constructive rather than actual."

In commenting on this case, the Oregon court said in a subsequent decision, *Fidelity & Casualty Co. of N.Y. v. Chapman,* 167 Ore. 661, 120 P. (2d) 223:

> "In this case the parties were not *in pari delicto.* The Railroad Company was primarily negligent while the negligence of the City was secondary. The Railroad Company was bound to indemnify the City by virtue of its contractual relationship. It was not a question of contribution between joint tort feasors whose active and concurrent negligence caused the injury."

None of the authorities cited by counsel under his argument under Point One go further than holding an indemnitee cannot, in a later action against indemnitor, deny facts litigated and determined in the case upon which the demand for indemnity is based.

In the case *Edinger & Co. v. S. W. Surety Ins. Co.,* 182 Ky. 340, 206 S. W. 465, recovery against Edinger & Co. depended upon proof of a vicious animal, which put the damage within an exception clause in the insurance policy. In the *Central of Georgia Railway Co. v. Macon Ry. & Light Co.,* 9 Ga. App. 628, 71 S. E. 1076, no contract was involved.

The *Hudson Valley* case supports Southern Pacific's position.

As we read the comments under Section 1067, *Restatement of Laws, Judgments,* the quotation cited was

not meant to apply to a situation where a contract exists, or where the primary negligence of the indemnitor caused the accident. We also wish to point out that under *Comment i,* the right of indemnitee to recover the amount of expenses for attorney's fees in defending the previous action, is supported.

Counsel cites no evidence justifying reversal of Finding No. 18, hence it should not be disturbed. *Fed. Rules of Civ. Proc.,* Rule 52 (a). The reference to previous "Findings" is, we believe, a typographical error, and Finding No. 17 only, relating to knowledge of position of the cart, was referred to in Finding No. 18.

Although some of the cases cited by counsel under his argument in Point Two are far afield from the situation here involved, we agree, as we previously stated, that so far as indemnitee is concerned the scope of estoppel created by the judgment in the primary case embraces all of the issues determined by it. *Astoria v. Astoria & Columbia R. R. Co.,* 67 Ore. 538, 136 Pac. 645, supra.

ANSWER TO BOOTH-KELLY'S SPECIFICATION OF ERROR NO. II

Summary of Argument

The determinations in the Powers case established only that Southern Pacific failed to provide its employee with a safe place in which to work in that it failed to warn him of the presence of the wood-cart, and that Powers suffered injuries in the amount of at least $44,699.46. Booth-Kelly was respon-

sible for Southern Pacific's failure to provide a safe place to work.

Since those determinations did not concern the question of responsibility as between the parties to this proceeding, the trial court properly found that Booth-Kelly's negligence in placing and leaving the cart within 42 inches from the track was the active, direct, proximate and primary cause of the injury to Powers.

In order to determine what was decided in the Powers case it is necessary to examine the proceedings upon which judgment was there obtained. It was agreed in the Pre-trial Order and found by the trial court that:

> "The complaint alleged breach of Southern Pacific Company's statutory duty of using ordinary care to provide said Mack D. Powers with a reasonably safe place in which to work in that * * * it failed to warn him of the presence of the wood-cart and the resultant insufficient clearance." (Admitted Facts, T. 34-5; Findings of Fact, T. 52.)

Thus upon judgment for Powers it was determined that Southern Pacific had breached its statutory duty of providing its employee with a safe place within which to work.

The primary cause of that breach was the placing and leaving of the wood-cart by Booth-Kelly. This was not only a negligent act primarily causing the injury, it was in specific violation of Booth-Kelly's obligations under the impaired clearance provisions of the contract.

The question of ultimate responsibility as between Booth-Kelly and Southern Pacific for the accident was not litigated or determined in the Powers case. Counsel

argues the Powers case determined that the accident resulted from the sole negligence of Southern Pacific. No such determination was made. The action established a breach of Southern Pacific's duty under the Federal Employers' Liability Act. Furthermore, had Powers been unable to collect from Southern Pacific, he could have sued Booth-Kelly and under the facts, could have recovered.

The Powers case did establish Booth-Kelly's responsibility for the presence of the cart. It is an admitted fact and was found by the court that the wood-cart was the property of Booth-Kelly and had been placed and left by it or its employees alongside the track on premises owned or used by Booth-Kelly. (T. 34, T. 52.)

In view of these facts, and since the findings of the trial court with respect to Booth-Kelly's negligence in placing and leaving the cart are not in conflict with matters litigated in the Powers case, no error was committed in entering Findings of Fact 9 and 10. *Fed. Rules of Civ. Proc.,* Rule 52 (a).

There is no finding by the trial court that failure to warn was an independent act of negligence and counsel's argument in this conection is therefore out of place in this appeal. As pointed out, the Powers case established the breach of a statutory duty. It is the question of ultimate responsibility for that breach that is important in this case.

Counsel's authorities under the heading "Failure to Warn" are not in point. *City of Seattle v. Peterson & Co.,* 99 Wash. 533, 170 Pac. 140, turns on a finding by the

jury in a previous case that the City had failed to maintain proper equipment to ground its electrical system, while the contractor's bond was limited to negligence of the contractor in the performance of his work. *City of Puyallup v. Vergowe,* 95 Wash. 320, 163 Pac. 779, was determined by reason of a finding of negligence against the City in failing to have street lights operating, which was again a matter separate from the contractor's duty.

In the instant case, Southern Pacific's breach of its statutory duty was caused by Booth-Kelly's negligent act by placing the wood-cart and the negligent omission to remove it, in direct violation of the impaired clearance provisions of the contract.

The quotation from *U.S.F. & G. Co. v. Thomlinson Co.,* 172 Ore. 307, 141 Pac. 817, is not in point, since it deals with sole negligence. Later in its opinion the court stated:

> "Where, however, two have been held liable to a third person for negligence, but as between themselves one of them is entitled to indemnity from the other an entirely different situation arises. * * * It is clear that the fact of the judgment in the Malben case and of the settlement in the Redd case established that both defendants therein owed money to the injured parties, but the judgment did not, as between themselves, determine which of the defendants was negligent or whether either of them was entitled to indemnity from the other."

Counsel's argument under Point Two likewise fails, since the Powers case determined only that Southern Pacific breached its statutory duty. Counsel lays great stress on cases from outside jurisdictions, and makes no

effort to apply Oregon decisions such as the *Astoria* case to the issues on this proceeding. *Wm. Cameron & Co. v. Thompson,* . . . Tex. Civ. App. . . ., 175 S. W. (2d) 307, is distinguishable because of the element of control over the object causing the injury, and because no breach of contract is involved. In the *Thompson* case, railroad company's crew negligently blocked the hand truck and failed to close the car door after being in the car. It had control over the hand truck and the car.

In the instant case, on the other hand, placing and leaving the cart was a breach of contract and Southern Pacific had no right to remove the cart. It was not, according to the instructions of the trial judge in the Powers case, negligent in allowing the cart to remain in position and had no right to remove it. (Reporter's transcript, Powers v. S. P. Co., p. 355-6.)

No agreement was involved in *Central & Georgia Ry. Co. v. Swift & Co.,* 23 Ga. App. 346, 98 S. E. 256, a case in which no opinion was written. *Glappa v. Detroit Etc. R. Co.,* 179 Mich. 76, 146 N.W. 134, involved an appeal by railroad from an adverse judgment recovered by a teamster. The question of Railroad's liability to the teamster was solely involved.

ANSWER TO BOOTH-KELLY'S SPECIFICATION OF ERROR NO. III

Summary of Argument

The trial court correctly found there was consideration for the spur track agreement as a whole, since Southern Pacific was not obligated by law to furnish service on the spur track.

Since there was consideration for the agreement involved in this action, it is immaterial whether or not the indemnity provision existed in prior agreements.

1. *A recovery in the California case by Powers under the Federal Employers' Liability Act established that interstate commerce was involved at the time of the accident. Hence provisions of the Interstate Commerce Act would apply.*

Section 51 of Title 45 U.S.C.A. under which recovery was sought by Powers, provides in part:

> "Every common carrier by railroad while engaging in commerce between any of the several states * * * shall be liable in damages to any person suffering injuries while he is employed by such carrier in such commerce * * *."

Although the Federal Employers' Liability Act affords considerable latitude to employees in the proof of interstate operations, the application of that act to the Powers claim constituted a determination that interstate commerce was involved at the time of the accident. No contention was made and no evidence was furnished by Booth-Kelly to the contrary in the trial court. Therefore the requirements of the Federal law, with regard to railroad operations over private industrial spur tracks, are applicable.

2. *Under provisions of the Interstate Commerce Act Southern Pacific was not obligated to undertake operations over the Booth-Kelly spur track.*

Section 1 (9) of Title 49 U.S.C.A. provides in part:

> "Sec. 1 (9) Switch connections and tracks. Any common carriers subject to the provisions of this chapter, upon application of any * * * shipper tendering interstate traffic for transportation, shall construct, maintain and operate upon reasonable terms a *switch connection* with any such * * * private side track which may be constructed to connect with its railroad, where such *connection* is reasonably applicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same; and shall furnish cars for the movement of such traffic to the best of its ability without discrimination in favor of or against any such shipper." (Emphasis supplied.)

If Booth-Kelly's interpretation of the law is correct, no contract would have been required. However, it is established that a railroad is not obligated to give service over a private industrial spur track and that an agreement to operate over such track is sufficient consideration for indemnity provision in a contract covering operations over the spur track.

The question of consideration was discussed in detail in *Luton Mining Co. v. Louisville & N. R. Co.,* 276 Ky. 321, 123 S.W. (2d) 1055, an action brought by the railroad against the mining company to recover the sum of money paid in comprising a claim for death of a brakeman, killed when his foot was caught in an unblocked frog while trying to loosen the brakes of a car. The brakeman at the time of the injury was using a pole while standing on the ground, in violation of company rules.

In 1918 the company made a contract with the railroad for the construction of a switchyard and connection. This contract, according to the decision, contained a provision that the mining company would hold harmless the director general and railroad company from all claims and demands arising directly or indirectly out of the maintenance of said tracks or the operation of rolling stock thereon.

It was claimed by the mining company that the contract was without consideration, was without mutuality, that it was discriminatory and was obtained by coercion.

The court found no evidence of coercion, and refuted the argument of the mining company that the railroad was required under law to furnish the switch connection, whereas to get the connection the mining company had to assent to the indemnity provisions. The court stated it was frequently held that contracts of this type are valid and in no sense contrary to public policy, citing *Gorman Coal Co. v. Louisville & N. R. Co.,* 213 Ky. 551, 281 S.W. 487; *New Orleans Great Northern Railway Co. v. St. Aleus & Co.,* 159 La. 36, 105 S. 91; *John Griffith's & Son v. National Fireproofing Co.,* 310 Ill. 331, 141 N.E. 739.

The *Luton* opinion goes on to discuss the matter of mutuality and consideration. The court states that the mining company's argument overlooks the fact that by the contract the railroad also bound itself to do things not required by law, i.e.:

(a) to construct the track, and under the *Gorman* case this was sufficient consideration, and (b) to undertake to place empty cars on the switch track and take loaded cars therefrom. The court then goes on to state:

> "It is not required by law to perform this service. The only obligations imposed on it were by virtue of paragraph 9 of Section 1 of the Interstate Commerce Act, as amended, 49 U.S.C.A., Sec 1 (9), which provides:
>
> (quoting the statute above set out)
>
> "It is apparent from a reading of this section of the statute that *no duty is imposed upon the railroad company beyond its own right of way. Except for the contract, the mining company would have had the duty and burden of moving empty and loaded cars to and from the switch covered by the contract.* The rule announced in *Cleveland C. C. & St. L. R. R. v. U. S.*, 275 U. S. 404, 48 Sup. Ct. 189, 72 L. Ed. 338, is not in conflict * * *. (it) decided only that the railroad company * * * could be compelled to make the *switch connection* when demanded by the shipper. We are of the opinion, therefore, that there was mutuality of contract and that no coercion or discrimination is proven or can be deduced from the contract itself." (Emphasis supplied.)

In this case, since Southern Pacific undertook to perform services which it could not be compelled to render, it could, in voluntarily undertaking to perform such services, impose such conditions and limitations as it might desire with respect to liability.

9 *Am. Jur, Carriers,* Sec. 737.

3. *Even should Oregon law apply, its provisions, like those of the Federal law, do not require operations over an industrial spur track.*

As can be seen by the wording of Sec. 113-108 O.C.L.A. set out in full on Page II of the appendix of Booth-Kelly's brief, the Oregon statute relating to construction and maintenance of switch connections uses substantially the same language as the provisions of the Interstate Commerce Act. Here again the railroad's obligation in connection with construction stops with building a switch connection, and its obligation with regard to operations ceases with its delivering cars to the switch connection. In this regard the Oregon law is identical with Federal law.

As under Federal law, application for the enforcement of this section can be made to the Public Utilities Commissioner. If counsel's interpretation of the law were correct it is inconceivable that Booth-Kelly and other industries similarly situated would not have requested such relief.

Counsel also cites Sec. 113-104 requiring railroad to keep and maintain adequate and suitable "switches, spurs, and side tracks for receiving, handling and delivering freight * * *." By general interpretation this section is limited to the construction of switches and spurs and side tracks on a railroad's own premises available for use by all shippers.

Southern Pac. Co. v. Railroad Comm., 60 Ore. 400, 119 Pac. 727.

We can see no purpose except obfuscation in citing Section 113-109 O.C.L.A. Booth-Kelly has never contended it operated a warehouse, the accident happened more than 150 feet from the main line of the railroad, and there is no evidence in the record that a public warehouse was involved in this case.

Subsections (18) to (22) inclusive of Section 1, 49 U.S.C.A. concern the question of necessity for Inter-State Commerce Commission orders relating to construction or abandonment of industrial and spur tracks, and not with the duty of a railroad to agree to serve an industry over a private track.

4. *Whether or not the indemnity provision was inserted in a revised contract is immaterial.*

Inasmuch as Southern Pacific was not obligated to argee to give Booth-Kelly service over the private spur track, it could impose such conditions as it might desire, before contracting to assume this service. While we contend the court should confine its decision to the 1941 agreement, and objected to the introduction of the previous agreements we wish to point out that other concessions were granted in the 1941 agreement, such as the use and maintenance by Booth-Kelly of the crane set-out spur and reload facilities. The indemnity provision of the contract was part of the bargained for consideration, and Booth-Kelly should not at this late date attempt to eliminate part of the contract.

ANSWER TO BOOTH-KELLY'S SPECIFICATION OF ERROR NO. IV

Summary of Argument

The indemnity provisions of the contract apply without regard as to whether or not Southern Pacific was directly serving Booth-Kelly since the obligation is clearly expressed and there is consideration for the contract as a whole, however the question is immaterial since no Finding of Fact was made by the trial court as to benefit to Booth-Kelly and the question was not included in Booth-Kelly's Specifications of Error.

Section 7 of the agreement contains two separate contractural provisions, stated in separate paragraphs. The first paragraph consists of an "exemption" contract and relates solely to fire damage. It relieves Southern Pacific from actions by Booth-Kelly or others for fire damage to the property of Booth-Kelly, or other property on Booth-Kelly's premises, arising out of Southern Pacific's operations while serving Booth-Kelly. These exemption provisions have long been used by railroads and their validity and the rights of the contracting parties thereunder have long been established.

The second sub-paragraph contains provisions indemnifying Southern Pacific in the event of damage to its employees or property from an "act or omission" of Booth-Kelly. These provisions concern an entirely separate matter, and are governed by separate case law.

Counsel claims under four rules of construction that the words "serving industry" can be carried over from

the exemption contract to the indemnity provision. These will be answered in order.

1. A consideration of the entire instrument shows that the matter of Southern Pacific's liability for fire was separately treated from the matter of Booth-Kelly's liability for its acts or omissions.

The contract contains a variety of separately stated situations where the rights, duties and obligations of the parties are carefully defined. The first sub-paragraph deals with damage arising out of fire, and separately expresses a limitation upon the liability of Southern Pacific. The second paragraph separately states the extent of liability assumed by Booth-Kelly.

2. The first and second paragraphs are not repugnant or incompatible, let alone inconsistent.

There is no incompatibility in the wording of the two paragraphs. The meaning is clear. Southern Pacific is liable for fire damages only when *not* serving industry. Booth-Kelly is liable for its act or omission causing injury whether or not Southern Pacific is using the track to serve it. The two clauses deal with different situations and far from being repugnant or even inconsistent, are merely inconvenient to the validity of Counsel's argument.

3. The rules of construction against the preparer does not apply where the meaning is clear.

Counsel's argument, especially in the light of his remarks under the previous rule of construction, is not so

much that the provisions of the second paragraph are vague, but that they state too clearly an obligation that now is unpalatable to Booth-Kelly. The first paragraph restricts Southern Pacific's relief from liability for fire damages to cases where it is serving Booth-Kelly. The second paragraph contains no such limitation and thus emphasizes to a careful reader, the broad coverage of Booth-Kelly's obligation for damages caused by its act or omission. Counsel is not merely seeking to have the contract construed against the preparer, he is asking that the contract be rewritten.

4. The indemnity provision in Section 7 is valid, and no modification by way of construction is necessary to support its validity.

As proved under our Answer to Specification of Error No. III, there was ample consideration for the contract as a whole, and the contract as a whole does not lack mutuality. See *Luton Mining Co. v. Louisville & N. R. Co.*, 276 Ky. 321, 123 S.W. (2d) 1055. It is well established that consideration is sufficient for as many promises as are bargained for and given in exchange if it would be sufficient for each one of them if that alone were bargained for. *Restatement of Laws, Contracts, Section* 83. Booth-Kelly, having bargained for Southern Pacific's promise to operate over its industry spur, and having given several promises in exchange therefor, should not now be heard in an attempt to split off part of the bargained for consideration.

Counsel has stressed the contention that Southern Pacific was not "serving industry", however the question of whether or not Booth-Kelly was benefitting directly or indirectly from Southern Pacific's operations at the time of the accident was not decided by the trial court, and no Specification of Error was made concerning the point. Therefore the question is immaterial so far as this appeal is concerned.

However, since counsel has "rung the bell", we wish to point out that the spur track agreement covers the entire spur, that the only unloading facilities shown belong to Booth-Kelly, that although Booth-Kelly had virtually ceased to take deliveries over the track since approximately 1939, (witness Nysten, T. 88) the 1941 agreement was executed in its present form. These facts are consistent with direct benefit to Booth-Kelly as landlord or as operator of reload facilities.

ANSWER TO BOOTH-KELLY'S SPECIFICATION OF ERROR NO. V

Summary of Argument

Southern Pacific is entitled to full recovery under Oregon as well as general law since Booth-Kelly's act or omission was the primary cause of the accident and Booth-Kelly's primary responsibility for the loss suffered by Southern Pacific was established by contract.

1. *Booth Kelly's act or omission was the primary cause of the damage to Powers.*

The trial court found, in its Findings of Fact:

> "9. Defendant was negligent in placing and leaving the wood cart within 42 inches from the spur track."
>
> "10. Defendant's negligence in this regard was the active, direct, proximate and primary cause of the injury to plaintiff's employee Powers."

In the face of these findings, it is surprising that counsel seeks to build an argument from a passing remark of the court in *Southern Pacific Co. v. Layman,* 173 Or. 273, 145 P. (2d) 295. The *Layman* case arose on demurrer to the answer which asserted that the *sole* cause of the injury was railroad's negligence. The case stands for the proposition that an indemnity provision will not be interpreted to indemnify the indemnitee against loss suffered *solely* by reason of his own negligence, in the absence of such intention expressed in unequivocal terms.

It is generally recognized that the need for invoking indemnity provisions of a contract does not arise until after the indemnitee has been held responsible in damages to a third person. The true question between indemnitor and indemnitee is responsibility under the terms of the agreement.

In its opinion, the court in the *Layman* case indicates that under a factual situation similar to that presented here, the indemnity provision would be invoked in favor of Southern Pacific. The court said:

> "By the terms of the contract now in question it was the duty of the defendant to maintain and

> keep the crossing in good repair, and it is readily conceivable that his negligent failure to discharge that obligation might be the primary cause of an accident to one of defendant's trains, which would result in injury to passengers and a consequent liability to the defendant. In such a case the plaintiff would invoke the indemnity clause of the contract. An interpretation which limits the general language of the agreement to instances of that character suffices to give effect to the agreement, and, in our opinion, it is reasonable."

This statement is in keeping with the decision in *Astoria v. Astoria & Columbia R. R. Co.,* 67 Or. 538, 136 Pac. 645, discussed earlier in this brief.

In the case at bar, it was the duty of Booth-Kelly to conduct its operations on or about the vicinity of the track in such manner that the clearances would not be impaired by any obstruction of any character. Its failure to observe that duty and its negligence in placing the wood cart within 42 inches of the track was the primary cause of the accident to Powers and of the consequent liability of Southern Pacific.

It is claimed that the rule in *Erie Railroad Co. v. Tompkins,* 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, applies not only to decisions in point but to considered dicta as well. As the portion of the *Layman* decision quoted on page 62 of the Booth-Kelly brief shows, the Oregon court did not stop to inquire whether the agreement if construed to apply to indemnitee's own *sole* negligence would be valid. Sole negligence is not here involved, and we make no further comment except to

call the court's attention to the general rule stated in 51 C. J., Railroads, Sec. 1314, p. 1185:

> "A railroad company may, when acting in its private capacity, relieve itself from an absolute liability imposed by statute for setting fire to property as well as for liability resulting from negligence * * *."

and to point out that such indemnity contracts are recognized by the general law.

New York Central R. Co. v. Culkeen & Sons Co., 249 Mass. 71, 144 N.E. 96;
John T. Gorman Coal Co. v. Louisville & N. R. Co., 213 Ky. 551, 281 S.W. 487;
Terminal R. Assn. of St. Louis v. Ralston-Purina Co., 352 Mo. 1013, 180 S.W. (2d) 693;
Buckeye Cotton Oil Co. v. Louisville & N. R. Co., 24 F. (2d) 347;
Deep Vein Coal Co. v. Chicago & E. I. R. Co., 71 F. (2d) 963.

Where a contract is involved, as here, the intent of the parties as expressed in that agreement must prevail. As pointed out by the Oregon court in *U. S. F. & G. Co. v. Thomlinson Co.*, 172 Or. 307, 141 P. (2d) 817, an indemnitee may recover despite his own acts if the agreement so provides. In such case, an indemnitee need not go so far as to prove that liability arose from the active or primary negligence of the indemnitor.

The cases cited by counsel on page 68 are not in point. *Johnson Administrator v. Richmond & D. R. Co.*, 86 Va. 975, 11 S.E. 829, involves an exemption contract. It was rejected by the Supreme Court of the United States in *Hartford Fire Ins. Co. v. Chicago M. & St. P. R. Co.*,

175 U.S. 91, 20 S. Ct. 33, 44 L. Ed. 84, and even in Virginia was changed by legislation. See *Aetna Ins. Co. v. Atlantic C. L. R. Co.,* 79 F. (2d) 465.

Other cases there cited illustrate the point that wherever there is a relationship involving public service companies, a bargain exempting the public utility from its duties *as such,* is invalid. These cases do not apply here, because Southern Pacific agreed to services beyond the requirements of the law.

Southern Pacific's right to recover in full is supported by the *Astoria, Thomlinson Co.* and other Oregon cases cited. Since Booth-Kelly's primary responsibility both under contract and independent of agreement has been established, recovery for $46,568.99 should be granted.

ANSWER TO BOOTH-KELLY'S SPECIFICATION OF ERROR NO. VI

Summary of Argument

The trial court's finding that the damage to Powers and the liability of Southern Pacific was the natural and necessary result of Booth-Kelly's breach of the provisions of the spur track agreement relating to impaired clearances, is supported by substantial evidence and should not be disturbed.

The trial court correctly determined that custom varying the provisions of the contract was not proven, and properly concluded there was no waiver of the breach of contract.

It is admitted by Booth-Kelly that the wood cart was placed and left by its employees within 42 inches of the spur track. (T. 34.) This distance is a violation of

the clearance lines prescribed in Section 5 of the agreement (T. 8-10.) By arguing that the cart is not included under the provisions of the agreement, counsel tacitly admits that the actions of Booth-Kelly's employees constituted a breach, if Section 5 applies to the wood cart.

Section 5 provides in part that "* * * no * * * material * * * or obstruction of any character shall be piled * * * stored or maintained" within specified clearance lines. It is clear the cart contained materials. It was an obstruction. It was stored or maintained alongside the track pending use by Booth-Kelly. Witness Nysten testified that the cart was pulled over into position by a tractor or jitney. After being left in position without motive power—as opposed to a Hyster engaged in loading—the cart was as permanant an obstruction as any pile of wood, pipe or poles.

The primary cause of Southern Pacific's failure to provide its employee Powers with a safe place in which to work, and the necessary cause of damage to Powers was the presence of the wood cart. Without its presence, no accident would have occurred.

The trial court correctly found that although employees of Southern Pacific knew of the presence of the wood cart and operations continued thereafter, the loss and damage to Powers were not proximately caused by these conditions (Finding of Fact No. 18, T. 54). The proximate cause as between the parties to this action was the act and omission of Booth-Kelly in placing and leaving the cart. The injury to Powers was the natural result

of placing the cart, and under the spur track agreement Booth-Kelly is answerable for the results of its breach.

Counsel's argument, and the citations made in Booth-Kelly's brief, slide away from the paramount question, that is, the responsibility as between Booth-Kelly and Southern Pacific for the damage to Powers and resulting loss to Southern Pacific, under the agreement.

We have already pointed out that in *Wm. Cameron & Co. v. Thompson,* ... Tex. Civ. App. ..., 175 S.W. (2d) 307, the hand truck was under control of the Railroad's employees. In *Central of Georgia Ry. Co. v. Swift & Co.,* 23 Ga. App. 346, 98 S.E. 256, no agreement was cited and no opinion was written. In *Glappa v. Detroit Etc. R. Co.,* 179 Mich. 76, as in *Kanawha Ry. v. Kerse,* 239 U.S. 576, 36 S. Ct. 174, 60 L. Ed. 448, appeals from actions successfully prosecuted by the injured parties were involved.

It is significant counsel cites no Oregon cases in support of his argument. As previously stated, Oregon law supports the contentions of Southern Pacific that the primary responsibility under the agreement rests on Booth-Kelly.

The existence of waiver was not proven by Booth-Kelly and the doctrine has no application under the facts of this case.

> Conclusion of Law No. 3, (T. 55);
> 56 *Am. Jur., Waiver,* Sections 11-17, 22, pp. 112-7;
> 67 *C. J., Waiver,* Sections 2-8, pp. 294-307.

There is no evidence that Southern Pacific, acting through any agent specifically authorized in the matter,

intentionally and voluntarily agreed to waive damages for breach of contract. The fact that employees continued to operate over the track after the presence of the cart became known does not establish authorization of employees to act or intention to waive by Southern Pacific.

Booth-Kelly has failed in its burden of proof on the subject.

56 *Am. Jur., Waiver,* Sec. 22, p. 123.

Nor is the doctrine of estoppal by custom applicable. As the stipulation between the parties shows (T. 110-11) there is testimony that no employee except the superintendent would have authority to modify the spur track agreement. The fact that the railroad's employees might have notified Booth-Kelly from time to time of pieces of lumber dropped on the track, would not establish a custom that Southern Pacific would always give such notice. In the instant situation, since the cart was placed and left by Booth Kelly's employees within 42 inches of the track, it was presumed they had knowledge, and warning would have been superfluous.

As a matter of law, the parol testimony of Witness Nysten was inadmissible to vary or contradict the terms of the spur track agreement.

2 *Jones on Ev.,* 4th Ed., Sec. 465, p. 887.

In any event, since evidence was introduced through only one witness on the subject, Booth-Kelly has failed to prove this defense.

Section 2-902, O.C.L.A.

SUMMARY

Since the placing and leaving of the wood cart was not only in direct violation of contract, but was found to be the primary cause of the damage to Powers and liability of Southern Pacific, Booth-Kelly's primary responsibility for the accident, as between the parties to this action is established. Southern Pacific is entitled to recover the full amount, $44,699.46 judgment costs and $1,869.53 costs and attorney fees.

Respectfully submitted,

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